UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

MICHAEL K. LEE, Complainant,	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 97B00031
AT&T, Respondent, and	)	Judge Robert L. Barton, Jr.
LUCENT TECHNOLOGIES, INC., Respondent-Intervenor.	)	

FINAL DECISION AND ORDER

(August 26, 1997)

I. PROCEDURAL BACKGROUND

On November 25, 1996, Complainant Michael K. Lee (Complainant or Lee) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent AT&T (AT&T). In the Complaint, Lee alleges that he is a United States citizen and that he was fired by AT&T on June 2, 1994, because of his citizenship status. Comp. ¶¶ 2, 9-10, 14. Further, Lee alleges that AT&T refused to accept the documents that he presented, namely, a Statement of Citizenship and an Affidavit of Constructive Notice that purportedly assert his rights as a United States citizen not to be treated as a nonresident alien. Comp. ¶ 16. Lee also states that he filed a charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) on September 1, 1995, and that OSC sent him a letter, via FAX on August 26, 1996, informing him that he could file a complaint directly with OCAHO. Compl. ¶¶ 18-19. Finally, Lee states that he wants back pay from June 2, 1994.[1] Compl. ¶ 21.

[1] The Complaint is not signed by Lee but, rather, by John B. Kotmair, Jr., pursuant to a document entitled "Privacy Act Release Form and Power of Attorney" signed by Lee on October 22, 1996, authorizing Kotmair to inquire of and procure from AT&T information and documents relating to the withholding of taxes. Whether the scope of that document is broad enough to demonstrate permission from Lee for Kotmair to represent him in proceedings before an OCAHO Administrative Law Judge is a moot point because I previously barred Kotmair from

(continued...)

The Complaint and a Notice of Hearing were mailed by certified mail to AT&T at the address indicated in the Complaint[2] on December 17, 1996. The return receipt card from the U.S. Postal Service shows that it was signed by a Norman Howard on December 22, 1996.

On January 16, 1997, a pleading entitled "Answer for Respondent" was filed in this case. The Answer states that Lucent Technologies, Inc. (Lucent), having been divested by AT&T and having been the employing entity of Complainant during the relevant time period, is answering the Complaint.[3] The Answer admits certain allegations of the Complaint and denies others. For example, the Answer admits that Lee worked for AT&T from July 15, 1991, to August 2, 1994, Ans. ¶ 11, but asserts that he was terminated because of unsatisfactory conduct (insubordination), not because of his citizenship status, Ans. ¶¶ 14, 16. The Answer further states that the Complaint should be dismissed because it fails to state a claim upon which relief may be granted, the Complaint is untimely, and there is a lack of subject matter jurisdiction. Ans. at 4.

On January 24, 1997, Complainant filed a motion to strike the answer to the Complaint filed by Lucent and to oppose any further responses from Lucent until Lucent proved that it was divested from AT&T prior to Lee's termination and that the decision to fire Lee was made by Lucent rather than AT&T. On January 30, 1997, Lucent filed an opposition to the motion to strike. On February 14, 1997, Complainant filed another motion to strike Lucent Technologies, Inc.,[4] and on that same date filed a motion for default judgment because AT&T had not filed an answer to the Complaint.[5]

In the First Prehearing Order, issued January 17, 1997, I required Complainant to file with the Court any information showing the date he received the OSC's determination letter in which OSC

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[1](...continued)
participation in this proceeding because of his demonstrated lack of competency to represent Lee in this matter and his repeated failures to adhere to the appropriate standards of conduct. See PHC Tr. at 4, 10; Lee v. AT&T, 7 OCAHO 924, at 7-10 (1997) (Order Excluding Complainant's Representative).

[2] AT&T, 1111 Woods Mill Road, Baldwin, Missouri 63011.

[3] Lucent was permitted to intervene in this matter by my Order Granting Lucent's Motion to Intervene, entered July 18, 1997. To date, AT&T still has made no appearance in this case.

[4] I denied both the motion to strike the answer filed by Lucent and to oppose further responses by Lucent and the motion to strike Lucent when I permitted Lucent to intervene in this case. See Order Granting Lucent's Mot. Intervene at 13.

[5] Complainant also filed a Second Request for Default Judgement and a Motion for Findings of Fact and Conclusions of Law. Neither of those motions was accepted for filing, and both were rejected as improperly submitted.

informed Complainant that it would not file a complaint on his behalf. Complainant never provided that information.

In the Second Prehearing Order, issued February 24, 1997, I ordered Complainant to provide a supplemental response concerning its Complaint allegations. I noted in that Order that, although the Complaint asserts that he was fired on February 6, 1994, in his October 19, 1995, letter to the OSC he states that he was fired on August 2, 1994. I ordered Complainant either to amend his Complaint or to explain the apparent inconsistency. Further, I ordered Complainant to submit a copy of the written notification from AT&T terminating his employment and to state whether the oral or written notification should be considered the date that he was fired. Complainant also was ordered to state the date(s) that AT&T refused to accept the documents specified in the Complaint. Finally, since Complainant had named AT&T as the respondent in the lawsuit and was seeking a default judgment against AT&T, I ordered Complainant to address the question of whether service on AT&T had been properly effectuated and to provide any evidence in its possession that AT&T was doing business at 1111 Woods Mill Road, Baldwin, Missouri 63011 on December 22, 1996, and that Norman Howard is an employee of AT&T authorized to accept service for AT&T. Complainant, to date, has not provided any of the above information.

In the Third Prehearing Order, issued March 12, 1997, I noted that I had allowed the parties to conduct limited discovery on the issues raised by the pending motions filed by Complainant as well as the defenses raised by Lucent concerning failure to state a claim, lack of jurisdiction, lack of timeliness in filing the Complaint, and the issue of proper service. I specifically gave leave to Lucent to file a motion addressing the issues raised in its Answer to the Complaint as well as whether Lucent is properly substituted as the proper Respondent. I also noted that Complainant's failure to comply with the Second Prehearing Order invited the imposition of sanctions or a possible finding of abandonment.[6]

On April 3, 1997, I issued a Fourth Prehearing Order in which I required Lucent to address certain questions concerning service of the Complaint and Complainant's status as an employee of AT&T or Lucent.

In a Fifth Prehearing Order, issued June 9, 1997, I required, among other things, that Complainant state how he alleges he was treated differently from other similarly situated employees of different citizenship. Specifically, but not exclusively, I ordered Complainant to state whether he

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[6] In a March 6, 1997, Order Striking Complainant's Pleading entitled "Response to Second Prehearing Order and Second Request for Default Judgment," I noted that the pleading in fact was not a response to the Second Prehearing Order and failed to provide the information required by that Order. I reminded Complainant that the response must be filed by March 11, 1997, and if he failed to do so, appropriate sanctions might be imposed pursuant to 28 C.F.R. §§ 68.23 and 68.37. Further, I ordered Complainant not to file any further pleadings until a proper response was made to the Second Prehearing Order.

contends that AT&T employs non-U.S. citizens who have presented Statements of Citizenship and Affidavits of Constructive Notice but who were not fired. Again, I clearly warned Complainant of the sanctions that are available, pursuant to 28 C.F.R. §§ 68.23(c)(1)-(5) and 68.37(b)(1) for failure to respond to any of my orders.[7] Complainant never responded to the Fifth Prehearing Order.

Lucent filed its present motion to dismiss or, in the alternative, for summary decision, on August 7, 1997.[8] Lucent submitted an affidavit and a brief in support of its Motion. As grounds for dismissal or summary adjudication, Lucent states that this tribunal lacks subject matter jurisdiction over Complainant's claim, that Complainant has failed to state a claim upon which relief can be granted, that Complainant failed to file a timely charge with OSC, and that Complainant failed to file a timely complaint with OCAHO. Lucent Mot. at 1.

Lee was entitled to file a response to Lucent's Motion on or before August 22, 1997. See 28 C.F.R. §§ 68.11(b), 68.8(c)(2) (1996). Lee has filed no such response.

II. STANDARDS GOVERNING DISMISSAL/SUMMARY DECISION

For the purpose of ruling on a motion to dismiss, the Court must assume that the facts as alleged in the complaint are true. Painewebber, Inc. v. Bybyk, 81 F.3d 1193, 1197 (2d Cir. 1996) (citing Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 411 (1986), and Bankers Trust Co. v. Rhoades, 859 F.2d 1096, 1098 (2d Cir. 1988), cert. denied, 490 U.S. 1007 (1989)); Coleman v. Watt, 40 F.3d 255, 258 (8th Cir. 1994); Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517, 521 (9th Cir. 1994), cert. denied, 115 S. Ct. 2640 (1995); Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 333 n.5 (3d Cir. 1975). In deciding a motion to dismiss, the complaint must be construed liberally, allowing the nonmoving party the benefit of all reasonable inferences that can be derived from the alleged facts. See Painewebber, 81 F.3d at 1197-98 (citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984)); Coleman, 40 F.3d at 258; Bent v. Brotman Medical Ctr. Pulse Health Servs., 5 OCAHO 764, at 3 (1995), 1995 WL 509457, at *2[9] (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Zarazinski v. Anglo Fabrics Co., Inc., 4 OCAHO 638, at 9 (1994), 1994 WL 443629, at *5.

"Conclusory allegations and unwarranted deductions of fact," however, are not assumed to

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[7] In contrast to Lee's lack of response, Lucent has supplied all of the information I requested from it in my various prehearing orders.

[8] The exclusion of Complainant's representative from this proceeding and Complainant's subsequent failures to respond to discovery requests and to my orders delayed the filing of the present Motion. See Order Setting Deadline for Lucent's Motion and Supporting Brief Required in the Third Prehearing Order (July 18, 1997).

[9] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

be true. Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974); see also Ott v. Home Savings & Loan Ass'n, 265 F.2d 643, 648 n.8 (9th Cir. 1958) (noting that the mere conclusions in the complaint are not assumed to be true). Also, the court "must not . . . assume plaintiffs can prove facts not alleged." Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A., 711 F.2d 989, 995 (11th Cir. 1983) (citing Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983)). "Notwithstanding this caveat, the threshold of sufficiency that a complaint must meet to survive a motion to dismiss for failure to state a claim is exceedingly low." Id.

A motion to dismiss should be granted only when it appears that under any reasonable reading of the complaint, the nonmoving party will be unable to prove any set of facts that would justify relief. Geller v. County Line Auto Sales, Inc., 86 F.3d 18, 20 (2d Cir. 1996) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); Coleman, 40 F.3d at 258; Bent, 5 OCAHO 764, at 3, 1995 WL 509457, at *2; Zarazinski, 4 OCAHO 638, at 9, 1994 WL 443692, at *5. "In the case of a *pro se* action, moreover, the court should construe the complaint more liberally than it would formal pleadings drafted by lawyers." Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990) (citing Hughes v. Rowe, 449 U.S. 5, 9 (1980) (per curiam)).

"If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ." Fed. R. Civ. P. 12(c);[10] see D'Amico v. Erie Community College, 7 OCAHO 948, at 4 (1997) (citing Yosef v. Passamaquoddy Tribe, 876 F.2d 283 (2d Cir. 1989), cert. denied, 494 U.S. 1028, and United States v. Italy Department Store, 6 OCAHO 847, at 2-3 (1996), 1996 WL 312113, at *2). Lucent relies on an affidavit in support of its present Motion. Consequently, I will treat Lucent's Motion as a motion for summary decision.

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996). Only facts that will affect the outcome of the proceeding are deemed material. United States v. Aid Maintenance Co., 6 OCAHO 893, at 4 (1996), 1996 WL 735954, at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); United States v. Tri Component Product Corp., 5 OCAHO 821, at 3 (1995), 1995 WL 813122, at *3 (Order Granting Complainant's Motion for Summary Decision) (citing same and United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994), 1994 WL 269753, at *2). An issue of material fact must have a "real basis in the record" to be considered genuine. Tri Component, 5 OCAHO 821, at 3, 1995 WL 813122, at *3 (citing

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[10] The Rules of Practice and Procedure that govern OCAHO proceedings provide that the Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1996).

Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587 and Primera, 4 OCAHO 615, at 2, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. at 4 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991),[11] 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b) (1996).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. Tri Component, 5 OCAHO 821, at 4, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing Primera, 4 OCAHO 615, at 3, 1994 WL 269753, at *2, and United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991), 1991 WL 531744, at *3).

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[11] Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Law of the United States, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances. Decisions that appear in Volume I will be cited to the page in that bound publication on which they first appear; the OCAHO reference number, by which all as yet unbound decisions are cited, also will be noted parenthetically for Volume I decisions.

III. DECISION AND ORDER

A. Lack of Subject Matter Jurisdiction

1. Citizenship status discrimination claim

"It is established OCAHO jurisprudence that administrative law judges have § 1324b jurisdiction [over national origin and citizenship status discrimination cases] only in those situations where the employee has been ***discriminatorily*** rejected or fired." Boyd v. Sherling, 6 OCAHO 916, at 21 (1997), 1997 WL 176910, at *17 (emphasis in original). Complainant alleges that he was knowingly and intentionally fired because of his citizenship status. Compl. ¶ 14(a). Complainant also responds in the affirmative to the statement on the OCAHO form complaint that "[a]lthough I was fired, other workers in my situation of different nationalities or citizenship were not fired." Compl. ¶ 14(e). By my Fifth Prehearing Order, dated June 9, 1997, I directed Complainant to provide particular facts to show how he received differential treatment from similarly situated workers. Specifically, I ordered Complainant to state whether he contends that AT&T employed non-U.S. citizens who had presented Statements of Citizenship and Affidavits of Constructive Notice but who were not fired. Fifth PHO at 1.

Complainant's response to the Fifth Prehearing Order was due in my office no later than June 24, 1997. To date, Complainant still has failed to respond to that Order. I warned Complainant that failure to comply with an order invited the imposition of sanctions, including ruling that the matters about which the order was issued be taken as established adversely to the non-complying party and ruling that a pleading or part of a pleading about which the order was issued be stricken. See Fifth PHO at 2 (citing 28 C.F.R. § 68.23(c) (1996)). Because Complainant has failed to comply with my Order, and in accordance with 28 C.F.R. § 68.23(c), I rule that the matter about which the Order was issued be taken as established adversely to Complainant and that Complainant's affirmative response in paragraph 14(e) of the Complaint be stricken. In particular, I take as established, because of Complainant's silence in response to my request for additional information, that Complainant does not allege that AT&T employed non-U.S. citizens who had presented Statements of Citizenship and Affidavits of Constructive Notice but who were not fired.

I cannot entertain jurisdiction over Complainant's citizenship status discrimination claim because Complainant does not allege the type of injury, i.e., a discriminatory injury, that conveys jurisdiction over a citizenship status case. Absent an allegation of disparate treatment, Complainant alleges no discriminatory injury. "A complaint of citizenship status [or] national origin discrimination which fails to allege ***discriminatory*** rejection or discharge is insufficient as a matter of law. Failure to allege a ***discriminatory*** injury compels a finding of lack of subject matter jurisdiction." Boyd, 6 OCAHO 916, at 21, 1997 WL 176910, at *17 (emphases in original); accord Hogenmiller v. Lincare, Inc., 7 OCAHO 953, at 5-6 (1997); Hutchinson v. GTE Data Servs., 7 OCAHO 954, at 6 (1997); Kosatschkow v. Allen-Stevens Corp., 7 OCAHO 938, at 12 (1997); Smiley v. City of Philadelphia Dep't of Licenses & Inspections, 7 OCAHO 925, at 18-19 (1997); Austin v. Jitney-Jungle Stores of America, Inc., 6 OCAHO 923, at 9 (1997), 1997 WL 269376, at *7. Accordingly, I must dismiss

Complainant's citizenship status discrimination claim for lack of subject matter jurisdiction.

2. Document abuse claim

Complainant alleges that Respondent refused to accept the following documents: a "Statement of Citizenship and Affidavit of Constructive Notice asserting [his] rights as a U.S. Citizen, as provided in Federal law and recognized by the U.S. Supreme Court, so that [he] would not continue to be treated as a non resident alien for any reason under Federal law." Compl. ¶ 16(a). The Immigration Reform and Control Act of 1986 (IRCA), which amends the Immigration and Nationality Act (INA), provides that

> a person's or other entity's request, for purposes of satisfying the requirements of section 1324a(b) of this title, for more or different documents than are required under such section or refusing to honor documents tendered that on their face reasonably appear to be genuine shall be treated as an unfair immigration-related employment practice relating to the hiring of individuals.

8 U.S.C. § 1324b(a)(6) (1994) (emphasis added). Section 1324a(b) delineates requirements of the employment verification system; among those requirements, an employer, within three business days of the date of hire, must examine documents presented by the employee that establish the employee's identity and eligibility to work in the United States. Id. § 1324a(b)(1); 8 C.F.R. § 274a.2(b)(ii) (1997). The employer must record information, including document identification number and, if applicable, expiration date, on the INS Employment Eligibility Verification Form (I-9 form), noting which documents were presented and examined. See id. § 274a.2(b)(v).

The employee must present and the employer must examine one List A document, which establishes identity and work eligibility, or one List B document, which establishes identity only, and one List C document, which establishes work eligibility only. Only certain types of documents are acceptable for establishing an employee's identity and/or work authorization. Acceptable List A documents are noted at 8 U.S.C. § 1324a(b)(1)(B) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A) (1997); acceptable List B documents are noted at 8 U.S.C. § 1324a(b)(1)(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(B) (1997); and acceptable List C documents are noted at 8 U.S.C. § 1324a(b)(1)(C) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(C) (1997).[12]

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[12] Section 412(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009, amends the INA to restrict the types of acceptable List A and List C documents, but only with respect to hires that occur after a date, to be set by the Attorney General, that falls within one year after the September 30, 1996 enactment date. See

(continued...)

"The employee completing the I-9 process is free to choose which among the prescribed documents to submit to establish identity and work authorization." Horne v. Town of Hampstead, 6 OCAHO 906, at 7 (1997), 1997 WL 131346, at *6; see also Costigan v. NYNEX, 6 OCAHO 918, at 7 (1997), 1997 WL 242199, at *5. In completing the I-9 process, the employer must accept any documents, from the statutory and regulatory lists of acceptable documents, presented by the employee that reasonably appear on their faces to be genuine and to relate to the person presenting them. "The Immigration Act of 1990 amended the INA to clarify that the employer's refusal to accept certain documents or demand that the employee submit particular documents in order to complete the Form I-9 violates IRCA's antidiscrimination provisions." Horne, 6 OCAHO 906, at 8, 1997 WL 131346, at *6 (citing Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6)).

The documents Complainant asserts Respondent refused to accept, a Statement of Citizenship and an Affidavit of Constructive Notice, are not among the types of documents acceptable to show an employee's identity and/or employment eligibility.[13] Complainant's allegation, therefore, fails to implicate the employment eligibility verification system. "[S]ection 1324b, as interpreted by regulation and administrative decisions, does not convey jurisdiction of a claim that an employer failed to accept documents that were not proffered in relation to the employment verification requirement." Costigan, 6 OCAHO 918, at 7, 1997 WL 242199, at *5; see also Hollingsworth v. Applied Research Assocs., 7 OCAHO 942, at 3, 5 (1997); Hutchinson v. End Stage Renal Disease Network of Fla. Inc., 7 OCAHO 939, at 4 (1997); Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico v. Erie Community College, 7 OCAHO 948, at 11-13 (1997); Cholerton v. Robert M. Hadley Co., 7 OCAHO 934, at 13-14 (1997); Lareau v. USAir, Inc., 7 OCAHO 932, at 13-14 (1997); Mathews v. Goodyear Tire & Rubber Co., 7 OCAHO 929, at 17-18 (1997); Jarvis v. AK Steel, 7 OCAHO 930, at 8 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 20; Wilson v. Harrisburg Sch. Dist., 6 OCAHO 919, at 16-17 (1997), 1997 WL 242208, at *13; Horne, 6 OCAHO 906, at 8. Complainant does not even allege that he presented the documents to establish identity and/or work

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[12](...continued)
Illegal Immigration and Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 412(e)(1), 110 Stat. 3009. Therefore, the prior, and more expansive, lists of acceptable documents continue to apply to this case.

[13] Although a Certificate of U.S. Citizenship, INS Form N-560 or N-561, is a document that an employer may accept as evidence of both the employee's identity and employment eligibility as part of the employment verification system pursuant to 8 U.S.C. § 1324a(b)(1)(B)(ii) (1994) and 8 C.F.R. § 274a.2(b)(v)(A)(*2*) (1997), Complainant's Statement of Citizenship is not such a document.

eligibility;[14] consequently, the Complaint itself shows that Complainant's claim fails to implicate the employment eligibility verification system.[15] As a result of the foregoing, I am compelled to render judgment against Complainant with respect to his document abuse claim because I lack subject matter jurisdiction over his particular allegations.

B. Failure to State a Claim

1. Citizenship status discrimination claim

"Document abuse excepted, disparate or differential treatment is the essence of a discrimination claim. . . . Where citizenship status is the forbidden criterion, there must . . . be some claim or allegation that the individual is being treated less favorably than others because of his citizenship status." Lee v. Airtouch Communications, 6 OCAHO 901, at 10 (1996), 1996 WL 780148, at *8, appeal filed, No. 97-70124 (9th Cir. 1997) (emphasis in original). As discussed previously, see supra part III.A.1, Complainant makes no such allegation of disparate treatment; specifically, he does not allege that AT&T accepted documents like the ones he tendered, i.e., the Statement of Citizenship and the Affidavit of Constructive Notice, from non-U.S. citizens without firing them. Absent an allegation of disparate treatment, Complainant's claim fails as a matter of law. See Hogenmiller, 7 OCAHO 953, at 5-6; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 13; Cholerton, 7 OCAHO 934, at 11-12; Costigan, 6 OCAHO 918, at 8-9, 1997 WL 242199, at *6; Boyd, 6 OCAHO 916, at 23-24, 1997 WL 176910, at *19-20; Winkler v. Timlin Corp., 6 OCAHO 912, at 6, 8-10 (1997), 1997 WL 148820, at *5, 7-9; Airtouch, 6 OCAHO 901, at 10, 1996 WL 780148, at *8.

Even if Complainant had made a prima facie showing of disparate treatment because of his citizenship status, which he did not, Lucent still would have prevailed on this point because Lucent presented a legitimate, non-discriminatory reason for firing Complainant. "Complainant has the burden of proving discrimination on the basis of citizenship status." Costigan, 6 OCAHO 918, at 9,

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[14] In the part of the OCAHO form complaint that inquires whether "[t]he Business/Employer refused to accept the documents that [Complainant] presented to show [he] can work in the United States," Complainant responds in the affirmative, but definitively crosses out the portion that states "to show [he] can work in the United States." Compl. ¶ 16.

[15] Information supplied by Lucent supports this conclusion. In the affidavit submitted in support of Lucent's Motion, Barbara Q. Ehlmann, Senior Equal Opportunity Specialist at Lucent and previously at the former AT&T, states that AT&T hired Lee on July 15, 1991, and verified his work authorization at that time. Ehlmann Aff. ¶ 5. "Thereafter, AT&T did not question his authorization to work under immigration law." Id. As Lee's eligibility to work in the United States already had been verified, there can be no question that Lee did not submit his Statement of Citizenship and his Affidavit of Constructive for purposes of the employment eligibility verification system.

1997 WL 242199, at *6 (citing Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 16 (1996), 1996 WL 670179, at *10, appeal filed, No. 96-3688 (3d Cir. 1996)). If Complainant had met its burden of stating a prima facie case of citizenship status discrimination, the burden of production would have shifted "to the employer to present a legitimate non-discriminatory reason for its employment action." Airtouch, 6 OCAHO 901, at 11, 1996 WL 780148, at *9 (citing St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993)). Even though that burden never actually shifted in this case, Lucent presented information that shows it would have met the burden. Lucent states that Lee was ordered not to take a scheduled business trip shortly after he tendered his Affidavit of Constructive Notice so that the tax matters raised therein could be resolved. Ehlmann Aff. ¶ 7. Lee violated that direct order from his manager by proceeding with the business trip and, thus, was terminated on August 2, 1994, because of that unsatisfactory conduct and insubordination. Id. Those statements stand unchallenged because of Lee's failure to respond to the present Motion.

2. Document abuse claim

In addition to the jurisdictional defect, Complainant has failed to state a claim of document abuse upon which relief may be granted. Complainant alleges that Respondent refused to accept his Statement of Citizenship and his Affidavit of Constructive Notice, but specifically negates the idea that Respondent refused those documents during the employment eligibility verification process. See supra notes 14 and 15 and accompanying text. Those documents are not even acceptable for showing an employee's identity and/or work authorization as part of the employment eligibility verification process. See supra notes 12 and 13 and accompanying text.

Assuming that all of Complainant's allegations in the Complaint are true, and construing those assumed facts in the light most favorable to Complainant, Complainant's claim of document abuse fails as a matter of law. As I stated on a prior occasion:

> IRCA does not create a blanket rule with respect to an employee's proffer of documents. Rather, section 1324b(a)(6) renders unlawful an employer's refusal to accept documents with respect to satisfying the requirements of section 1324a(b), which references the employment verification system. IRCA does not render unlawful an employer's refusal to accept documents that are not related to the employment eligibility verification procedures provided in IRCA.

Costigan, 6 OCAHO 918, at 9-10, 1997 WL 242199, at *7. Another Administrative Law Judge's recent holding also is particularly apt:

> [T]he prohibition against an employer's refusal to honor documents tendered . . . refers to the documents described in § 1324a(b)(1)(C) tendered for the purpose of showing identity and employment authorization. Because neither of the documents [the complainant] asserts that [the respondent] refused to accept is a document acceptable for these purposes, and, moreover, because the documents were not offered for these purposes,

> the complaint fails to state a claim upon which relief may be granted as to the allegations of refusal to accept documents appearing to be genuine.

Airtouch, 6 OCAHO 901, at 13, 1996 WL 780148, at *10; see also Hogenmiller, 7 OCAHO 953, at 4; Hollingsworth, 7 OCAHO 942, at 3, 5; End Stage, 7 OCAHO 939, at 3-4; Kosatschkow, 7 OCAHO 938, at 12, 23; D'Amico, 7 OCAHO 948, at 14; Cholerton, 7 OCAHO 934, at 13-14; Werline v. Public Serv. Elec. & Gas Co., 7 OCAHO 935, at 8 (1997); Lareau, 7 OCAHO 932, at 13-14; Mathews, 7 OCAHO 929, at 17-18; Jarvis, 7 OCAHO 930, at 6; Winkler v. West Capital Fin. Servs., 7 OCAHO 928, at 11 (1997); Smiley, 7 OCAHO 925, at 26-27; Austin, 6 OCAHO 923, at 19-20, 1997 WL 269376, at *15; Wilson, 6 OCAHO 919, at 16, 1997 WL 242208, at *13; Boyd, 6 OCAHO 916, at 26-27, 1997 WL 176910, at *21-22; Timlin Corp., 6 OCAHO 912, at 6, 10-12, 1997 WL 148820, at *5, 9-11. Consequently, Complainant fails to state a claim upon which relief can be granted as to the allegation of document abuse pursuant to 8 U.S.C. § 1324b(a)(6).

C. Lack of Timeliness

A complaint cannot be filed with an administrative law judge respecting any conduct that a complainant alleges constitutes an unfair immigration-related employment practice that occurred more than 180 days before the filing of the charge with the Office of Special Counsel for Immigration-Related Unfair Employment Practices. See 8 U.S.C. § 1324b(d)(3) (1994). Complainant alleged in his charge with OSC that AT&T fired him because of his citizenship status on August 2, 1994, see OSC Charge ¶¶ 6-7 (attached as unmarked exhibit to Complaint), but stated in his Complaint that he was fired on June 2, 1994, see Compl. ¶ 14(c). Lucent has stated that Complainant was terminated on August 2, 1994. See Amended Ans. ¶ 14.

Complainant has alleged that he filed his charge with OSC on September 1, 1995, see Compl. ¶ 18, and Lucent has admitted that allegation, see Amended Ans. ¶ 18. A letter from OSC to AT&T also referenced September 1, 1995, as the date on which Complainant filed its charge. See Letter from David J. Palmer, OSC Trial Attorney, to Barbara Ehlmann, ATT Network Systems, of Feb. 12, 1996, at 1 (attached as unmarked exhibit to Complaint).

Assuming that August 2, 1994, is the date on which Complainant was fired, Complainant filed his charge with OSC 395 or more days after the alleged unfair immigration-related employment practices.[16] That falls well outside the 180-day period mandated by statute. If, as alleged in the Complaint, Complainant was fired on June 2, 1994, Complainant's charge came 456 or more days

[16] The charge was filed 395 days after the alleged discriminatory firing and more than 395 days after the alleged acts of document abuse, as the alleged acts of document abuse occurred before Complainant was fired, see Letter from Michael K. Lee to Lawrence E. Mitchell, U.S. Department of Justice, of Oct. 19, 1995, at 1 (referenced in OSC Charge ¶ 9).

after the alleged unfair immigration-related employment practices.[17] Either way, Complainant's charge with OSC was filed more than 180 days after the alleged discriminatory events.

Lee states, however, that he filed a charge on December 23, 1994, with the Equal Employment Opportunity Commission (EEOC) based on the same facts that gave raise to his OSC charge. See OSC Charge at 3. The 180 day filing deadline generally is extended for periods in which (1) the employer held out hope of employment or the applicant was not informed that he was not being considered; (2) by misconduct or otherwise, the employer lulled the applicant into inaction during the filing period; or (3) the charging party timely filed his or her charge in the wrong forum. United States v. Weld County Sch. Dist., 2 OCAHO 326, at 17 (1991), 1991 WL 531749, at *13.

A Memorandum of Understanding (MOU) between EEOC and OSC also addresses the issue of the timeliness of an OSC charge that first is filed with EEOC. Under the MOU, OSC and EEOC each have appointed the other "to act as their respective agents for the sole purpose of allowing charging parties to file charges to satisfy the statutory time limits." Toussaint v. Tekwood Assocs., Inc., 6 OCAHO 892, at 10 (1996), 1996 WL 670179, at *7, appeal filed, No. 96-3688 (3d Cir. 1996) (quoting MOU, 54 Fed. Reg. 32,499, 32,500 (1989)). "A charge is timely filed under IRCA if it is filed with OSC, or an agency with which OSC has an MOU, at the most, 180 days after the alleged discriminatory event." Id. at 11, 1996 WL 670179, at *8 (citing Walker v. United Air Lines, Inc., 4 OCAHO 686, at 29 (1994), 1994 WL 661279, at *18, and Reyes v. Pilgrim Psychiatric Ctr., 3 OCAHO 529, at 2 (1993), 1993 WL 403248, at *1).

However, as the MOU predates the existence of the document abuse cause of action (which was created by the Immigration Act of 1990) and only refers to national origin and citizenship status discrimination, "the MOU does not render a filing of document abuse charges with EEOC a simultaneous filing with OSC for purposes of the 180 day filing deadline." Id. (citing United States v. Hyatt Regency Lake Tahoe, 6 OCAHO 879, at 11 (1996), 1996 WL 570514, at *8). Consequently, Complainant's filing of a charge with EEOC, even assuming that he filed it with EEOC within the 180 day period, does not render Complainant's document abuse charge timely. I dismiss Complainant's document abuse claim on the additional grounds that the OSC charge underlying it was not filed in a timely manner.

Complainant filed his EEOC charge 143 days after he was fired on August 2, 1994; thus, Complainant filed a complaint with EEOC in time to toll the running of the 180 day time limit with respect to his OSC charge of citizenship status discrimination. The current record, however, reveals no information regarding how long Complainant's charge was pending before EEOC, so it is impossible to tell when the counting of the 180 day period would have resumed.[18] The inability to

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[17] See analysis supra note 16.

[18] Lucent argues that Lee did not file his OSC Charge within 180 days of his termination because, as a result of his failure to respond to discovery requests and my ensuing Order Granting

(continued...)

reach a conclusion regarding that issue, however, is immaterial because I already have determined that Complainant's citizenship status discrimination claim fails on two other independent grounds: lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Also, I do not reach Lucent's argument regarding whether Lee filed his Complaint with OCAHO in a timely manner.

D. Complainant's Abandonment of Complaint

Complainant has failed repeatedly to comply with and respond to my orders to provide various pieces of information. As outlined above, see supra part I, Lee has failed to provide the information requested in my First, Second, and Fifth Prehearing Orders. Because Lucent raised the issue of timeliness in its Answer to the Complaint, in the First Prehearing Order, issued January 17, 1997, I ordered Complainant to file with the Court and serve on the opposing party any information showing the date he received OSC's determination letter in which OSC informed him that it would not file a complaint on his behalf. Lee's response to that Order was due no later than February 6, 1997. No response has appeared to date.

In the Second Prehearing Order, issued February 24, 1997, I ordered Complainant to provide, by March 11, 1997, a supplemental response concerning its Complaint allegations. I noted in that Order that, although the Complaint asserts that he was fired on February 6, 1994, Lee's October 19, 1995, letter to the OSC states that he was fired on August 2, 1994. I ordered Complainant either to amend his Complaint or to explain the apparent inconsistency. He has done neither. Further, I ordered Complainant to submit a copy of the written notification from AT&T terminating his employment and to state whether the oral or written notification should be considered the date that he was fired. He has not done so. Complainant also was ordered to state the date(s) that AT&T refused to accept the documents specified in the Complaint. Finally, since Complainant had named AT&T as the respondent in the lawsuit and was seeking a default judgment against AT&T, I ordered Complainant to address the question of whether service on AT&T had been properly effectuated and to provide any evidence in its possession that AT&T was doing business at 1111 Woods Mill Road, Baldwin, Missouri 63011 on December 22, 1996, and that Norman Howard is an employee of AT&T authorized to accept service for AT&T. Complainant has provided none of the information required

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[18](...continued)
Lucent's Motion to Compel Discovery of June 24, 1997, he is deemed to have admitted that information. See Lucent Brief in Support of Mot. at 1, 4. Even though Lee has been deemed to have admitted that he did not file a charge with OSC within 180 days of his termination date, that admission, standing alone, says nothing about whether circumstances existed that tolled the running of the 180 day period and potentially made the filing legally timely even though it literally was made after a consecutive block of 180 days.

in the Second Prehearing Order.[19]

In the Third Prehearing Order, issued on March 12, 1997, I noted that as of that date Complainant had not provided the information required by the Second Prehearing Order, and that Complainant's failure to comply invited the imposition of sanctions or a possible finding of abandonment. See 28 C.F.R. §§ 68.23(c), 68.37(b) (1996).

In my Fifth Prehearing Order, issued June 9, 1997, I ordered Complainant to provide information regarding the nature of his citizenship status discrimination claim. Lee's response to that Order was due on or before June 24, 1997. Yet again I warned Lee of the possible consequences of failure to respond to my orders, including the possibility of dismissal of his case on grounds of abandonment. In keeping with his established pattern of silence, Lee still has provided no response whatsoever to the Fifth Prehearing Order.

Finally, Lee also has failed to comply with my Order Granting Lucent's Motion to Compel Discovery, issued June 24, 1997. Lucent's motion to compel became necessary after Lee failed to respond to Lucent's discovery requests by a previously established deadline. In my Order granting Lucent's motion, I deemed certain matters admitted and required Lee to submit responses to the remaining discovery requests by July 7, 1997. For the final time, I warned Lee that I could dismiss his case because of abandonment if he failed to respond to my orders. Unsurprisingly, given Lee's prior and repeated lack of action, he did not comply with my Order compelling him to respond to Lucent's discovery requests.

Section 68.37(b) provides in pertinent part that a complaint may be dismissed upon its abandonment by the party who filed it, and that a party shall be deemed to have abandoned a complaint if a party or his representative fails to respond to orders by the Administrative Law Judge. See, e.g., Deguzman v. First American Bank Corp., 3 OCAHO 585, at 4 (1993), 1993 WL 604452, at *3 (failure of pro se complainant to respond to an order requiring, among other items, an explanation of complainant's understanding of the basis for being fired because of citizenship status discrimination); Speakman v. The Rehabilitation Hosp. of South Tex., 3 OCAHO 476, at 4 (1992), 1992 WL 535634, at *2 (failure of pro se complainant to respond to a show cause order). Numerous OCAHO decisions hold that a party's failure to comply with an order warrants a finding of abandonment. See, e.g., United States v. Hotel Valet, Inc., 6 OCAHO 849, at 2-3 (1996), 1996 WL 312118, at *1-2 (failure to respond or to object to discovery requests and failure to respond to a motion to compel); Palancz v. Cedars Medical Ctr., 3 OCAHO 443, at 7-14 (1992), 1992 WL 535580, at *5-10 (failure to comply with discovery orders); United States v. El Dorado Furniture Mfg., Inc., 3 OCAHO 417, at 4 (1992), 1992 WL 535555, at *2-3 (failure of a pro se respondent to amend an insufficient pleading after being ordered to do so).

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[19] Complainant did submit a pleading entitled "Response to Second Prehearing Order and Second Request for Default Judgment," which was received on March 10, 1997. However, this document did not address, much less provide, the information required by the Second Prehearing Order. Consequently, that pleading was not accepted for filing.

In this case, although Lee submitted a pleading that was titled as a response to the Second Prehearing Order, in fact he did not comply with that Order,[20] or with my Order Granting Lucent's Motion to Compel Discovery. Lee also failed to respond to my requests for information in the First and Fifth Prehearing Orders. Lee flagrantly disregarded my orders despite my repeated admonitions regarding the potential consequences of his failures to respond. Any one of Lee's failures to respond could have provided ample grounds for a finding of abandonment, but, here, Lee has failed to respond to or to comply with my orders on four independent occasions. Lee's pattern of inaction has caused enormous delay in resolving this case. In addition to the previously discussed grounds for dismissal, I dismiss Lee's Complaint upon a finding that he has abandoned his Complaint by virtue of his failures to respond to or to comply with my orders. See 28 C.F.R. § 37(b)(1) (1996).

E. Attorney's Fees

Lucent has requested that it be awarded its costs in responding to this action. See Ans. at 5. Once a case involving allegations of unfair immigration-related employment practices has been adjudicated, the prevailing party may recover a reasonable attorney's fee if the losing party's argument was without reasonable foundation in law and fact. See 8 U.S.C. § 1324b(h) (1994); 28 C.F.R. § 68.52(c)(2)(v) (1996).

At this time I am reserving judgment on the issue of whether Lucent is entitled to receive attorney's fees and, if so, in what amount. The parties will be given an opportunity to brief the question of attorney fees. Lucent bears the burden of demonstrating that the Complainant's position was without reasonable foundation in law and fact, and that burden is especially heavy when, as here, the Complainant was acting without legal counsel.

Therefore, Lucent is ordered to file, not later than September 25, 1997, a certification of services detailing the fees and costs incurred in connection with this action, including a detailed itemized statement of the hours expended and the hourly rate. It is Lucent's burden to show that the requested attorney's fee is "reasonable" within the meaning of the statute. Further, Lucent will support its request with a legal brief or memorandum showing why Complainant's arguments are "without reasonable foundation in law and fact." Complainant shall have twenty days from the date of service of Lucent's submission to file its response to Lucent's submission.[21]

IV. CONCLUSION

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[20] Instead, Complainant's pleading contained contemptuous statements, such as the statement on page three that "Judge Barton's second prehearing order is not only frivolous, its (sic) also less than genuine act as a federal Administrative Law Judge."

[21] The parties are reminded that "file" means that the document must be received by my office by that date. See 28 C.F.R. § 68.8(b) (1996).

After considering the parties' submissions, as well as Complainant's failure to make certain submissions, I grant Lucent's Motion and enter judgment in its favor. I also dismiss the Complaint with respect to Respondent AT&T.[22] Assuming that every fact Lee has alleged is true, I make the following findings:

1. I lack subject matter jurisdiction over Complainant's citizenship status discrimination and document abuse claims;

2. Complainant's allegations of citizenship status discrimination and document abuse fail to state causes of action upon which this forum may grant relief;

3. Complainant filed his document abuse charge with OSC in an untimely manner; and

4. Complainant has abandoned his Complaint as a result of his repeated and numerous failures to respond to my orders.

In light of those findings, Lee's Complaint is dismissed. Also, Lee's Motion for Default Judgment against AT&T is denied. I retain jurisdiction for purposes of deciding whether Lucent is entitled to attorney's fees in this case.

As provided by statute, not later than 60 days after entry of this final decision and order, a person aggrieved by such order may seek a review of the order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business. See 8 U.S.C. § 1324b(i); 28 C.F.R. § 68.53(b). This final decision and order on the merits is the final decision for purpose of computing time for appeal where I have retained jurisdiction for resolution of fee-shifting issues. See Hollingsworth, 7 OCAHO 942, at 6 (1997) (citing Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988), and Fluor Constructors, Inc. v.

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[22] AT&T's failure to appear does not thwart my ability to dismiss the Complaint with respect to AT&T because I find, among other reasons, that I lack subject matter jurisdiction over Complainant's allegations. Subject matter jurisdiction is an issue that may be raised at any time, even by a court sua sponte. See Westmoreland Capital Corp. v. Findlay, 100 F.3d 263, 266 (2d Cir. 1996); Fitzgerald v. Seaboard System R.R., Inc., 760 F.2d 1249, 1251 (11th Cir. 1985). In fact, a court is obligated to inquire into subject matter jurisdiction whenever the possibility that jurisdiction does not exist arises. See Petereit v. S.B. Thomas, Inc., 63 F.3d 1169, 1175 (2d Cir. 1995), cert. denied, 116 S. Ct. 1351 (1996); Fitzgerald, 760 F.2d at 1251. In dismissing the Complaint against AT&T, I deny Complainant's Motion for Default Judgment against AT&T in favor of reaching a disposition on the merits of the case. See D'Amico, 7 OCAHO 927, at 2-3 (citing, inter alia, Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 95-96 (2d Cir. 1993); H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242 (3d Cir. 1951)). Also, I find that Complainant has abandoned his Complaint against AT&T by failing to respond to or comply with my orders directing him to provide certain information.

Reich, 111 F.3d 94 (11th Cir. 1997) (specifically addressing time limit for appeal on the merits when jurisdiction is retained for adjudication of fee-shifting in an administrative proceeding)).

SO ORDERED.

Dated and entered this 26th day of August, 1997.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of August, 1997, I have served the foregoing Final Decision and Order on the following persons at the addresses shown by first class mail, unless otherwise noted:

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